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Supreme Court, U.S.
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No. 93-577

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT J. MAXWELL, PETITIONER

v.

FIRST NATIONAL BANK OF MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, following the government's assertion of the state secrets privilege, the district court properly barred petitioner from offering at trial any evidence that would tend to confirm or deny any connection between respondents and the Central Intelligence Agency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 998 F.2d 1009 (Table). The opinion of the district court (Pet. App. 5a-15a) is unreported, but the district court's order adopting the Magistrate Judge's Report and Recommendation is reported at 143 F.R.D. 590. The Report and Recommendation of the Magistrate Judge (Pet. App. 16a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1993. The petition for a writ of certiorari was filed on October 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Robert J. Maxwell worked for respondent First National Bank (Bank or FNB) as an executive in its International Division from October, 1983, to August, 1985, when he left that position to accept a job at another bank (Pet. App. 36a, 47a-48a; First Amended Complaint, ¶¶ 9, 58-59). Petitioner maintains that, while he was employed at FNB, he worked on an account for respondent Associated Traders Corporation (ATC), a business entity that he alleges was affiliated with the Central Intelligence Agency (CIA) (Pet. App. 37a, ¶ 11). He further alleges that it was his belief that some of ATC's transactions were illegal (Pet. App. 39a, ¶ 23) and that he sought written authorization from his superiors to conduct certain transactions on behalf of ATC in a manner that he thought was "out of the ordinary" (Pet. App. 40a-42a, ¶¶ 27-36). Petitioner also claims that he requested that his name be removed from the ATC account (Pet. App. 41a, ¶32; Pet. App. 43a, ¶ 43).

Although that request was ultimately honored (Pet. App. 46a, ¶ 53), and despite repeated reassurances from FNB officials that petitioner's work was not illegal (*e.g.*, Pet. App. 44a-45a, ¶¶ 48-49), petitioner alleges that he was concerned that he would be held criminally liable for his work on the ATC account, thus causing him to suffer anxiety and fear (Pet. App. 43a-44a, ¶ 44). More than a month after leaving FNB, petitioner suffered a nervous breakdown, which he alleges resulted from stress induced by working on the ATC account (Pet. App. 48a-49a, ¶ 62).

2. a. On August 11, 1988, almost three years after leaving his position with FNB, petitioner filed suit

against the Bank, alleging misappropriation of name, constructive discharge, and intentional and negligent infliction of emotional distress.[1] In June, 1990, he was granted leave to file an amended complaint, in which he named ATC as an additional defendant and alleged that ATC was a "proprietary company of the U.S. Central Intelligence Agency" (Pet. App. 36a, ¶ 6). Because ATC was dissolved on August 10, 1988, petitioner also named as defendants ATC's Directors, Thomas G. Hardie, John Keating, and Jeremy Tyrone, who became Trustees of ATC assets after dissolution (Pet. App. 36a, ¶ 7).[2] Finally, petitioner named as defendants "John Does One through Ten," whom he alleged were officials of the CIA, the FBI, and the Department of Justice (Pet. App. 36a, ¶ 8).

The Amended Complaint contained five counts. Count 1 alleged a conspiracy to violate 42 U.S.C. 1985(2), based on petitioner's assertions that he "perceived" statements by an FNB official to him in March, 1985, as "veiled threats" against him and his family (Pet. App. 42a-43a, ¶ 39), and that in January, 1989, after petitioner filed suit, FNB's counsel relayed a threat from employees of the CIA, the FBI and the Department of Justice, urging petitioner "to go easy" on the case (Pet. App. 50a-51a, ¶¶ 69-73). Count 2 alleged that these purported threats violated petitioner's First and Fifth Amendment rights (Pet. App. 51a-52a, ¶¶ 74-79). Count 3 alleged that FNB abusively discharged petitioner by creating intolera-

[1] Petitioner originally filed suit in state court. The action was removed to federal court in September, 1988.

[2] The use of "ATC" in this brief refers to ATC and its individual Directors and Trustees, collectively.

ble working conditions for him after he voiced concerns about transactions he allegedly carried out for the ATC account (Pet. App. 52a-53a, ¶¶ 80-85). Count 4 alleged that petitioner suffered intentional infliction of emotional distress because FNB threatened and intimidated him in connection with the ATC account (Pet. App. 53a-54a, ¶¶ 86-89). Finally, petitioner alleged in Count 5 that FNB misappropriated his name by retaining it on the ATC account after his request that it be removed (Pet. App. 54a, ¶¶ 90-92).

During discovery, petitioner sought to compel responses to questions posed at a deposition of one of his supervisors at FNB concerning the CIA's connection with FNB and the nature of various transactions by ATC. Petitioner also sought production of wire fund transfers and other documents concerning ATC (C.A. App. 114, 289). The district court initially granted the motion to compel in part (C.A. App. 114-115), finding that the privilege asserted by the Bank "does not apply because only the government can assert it" (C.A. App. 114).

b. The United States then filed a Suggestion of Interest pursuant to 28 U.S.C. 517, and moved for a protective order precluding all discovery or use at trial of information "that would tend either to confirm or deny any alleged connection between the Central Intelligence Agency and either defendant First National Bank of Maryland or defendant Associated Traders Corp[oration]" (C.A. App. 129). The basis for the protective order motion was the formal assertion of the state secrets privilege by then-Director of Central Intelligence, William Webster, in a public declaration (C.A. App. 133-138), supported by a classi-

fied *in camera, ex parte* declaration further explaining the reasons for the privilege.[3]

Director Webster's declaration acknowledged that, among the intelligence sources and methods the CIA uses are proprietaries, which are "business entities, wholly owned by the U.S. Government, which either actually conduct or appear to conduct business as private commercial companies" (C.A. App. 135, ¶ 7). He further explained that the CIA is repeatedly asked, through discovery and FOIA requests, to respond to inquiries concerning its covert contacts with individuals and various entities, including proprietaries.

Despite the general acknowledgment that the CIA uses proprietaries as intelligence methods, Director Webster stated that it was "absolutely essential" to his responsibilities as Director of Central Intelligence to preserve his ability to decline to discuss allegations regarding specific covert relationships, whether true or not (C.A. App. 136, ¶ 8). Because petitioner sought such information concerning ATC, Director Webster determined that the assertion of the state secrets privilege was necessary and appropriate to protect the national security (C.A. App. 135-137, ¶¶ 6, 9).

Director Webster stated that, if the allegations concerning FNB or ATC were true, discovery and further litigation of petitioner's allegations concerning the CIA would inevitably lead to disclosure of matters that would jeopardize intelligence sources

[3] This classified declaration will be produced under appropriate security procedures for the Court's review upon its request.

and methods, result in a loss of valuable intelligence, provide foreign intelligence entities with valuable information, allowing them to take measures to counter CIA efforts, and have a chilling effect on the CIA's ability to recruit and use intelligence methods. On the other hand, Director Webster stated that, if petitioner's allegations were untrue and were confirmed as such, harm to the national security would result because foreign intelligence entities would be able to concentrate their activities elsewhere. Such a confirmation would, moreover, erode the ability of the Director of Central Intelligence to refuse to confirm or deny other similar allegations in the future (C.A. App. 136-137, ¶ 9).

c. The district court referred the United States' motion for protective order and plaintiff's motion to compel discovery to a Magistrate Judge for disposition (C.A. App. 283, 285). On October 9, 1991, the Magistrate Judge recommended that the United States' motion for protective order be granted (Pet. App. 16a-33a).

The Magistrate Judge first held that the government had satisfied the requirements for assertion of the privilege articulated in *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953) (Pet. App. 19a). She then rejected the argument that the government could not assert the state secrets privilege in a lawsuit between private parties who have no relationship with the government (Pet. App. 22a-23a). The Magistrate Judge further held that neither speculation and published accounts about ATC's relationship to the CIA (primarily the result of petitioner's disclosures to the press) nor accidental disclosure could waive the government's privilege (Pet. App. 24a). Finally, the

Magistrate Judge noted that any attempts by the Bank or ATC to respond to plaintiff's assertions "would go to the heart of the state secrets that must be protected" (Pet. App. 30a-31a).

d. The district court adopted the Magistrate Judge's Report and Recommendation and granted the United States' motion for a protective order. This order provided (1) that "[petitioner] is precluded from seeking or obtaining any discovery that relates to his allegations of covert relationships between the CIA and either defendant [FNB] or defendant [ATC]," and (2) that "[petitioner] is precluded from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC" (Pet. App. 14a-15a).

e. The district court subsequently granted summary judgment to FNB and ATC (Pet. App. 13a). The court held that petitioner could not prove a violation of 42 U.S.C. 1985(2) because, in order to prove that the CIA acted in concert with FBI agents as well as respondent FNB, he would risk violation of the protective order by exposing evidence at trial that would tend to confirm or deny the existence of the CIA's role in the alleged relationship (Pet. App. 9a). Similarly, because petitioner's constitutional claims would depend upon showing that FNB acted as an agent of the government (a showing that would risk exposure of the privileged information in violation of the protective order), the court dismissed these claims as well (Pet. App. 10a). The court held that the state law claims of wrongful discharge and intentional infliction of emotional distress also must be dismissed, because petitioner would be unable to

prove that he was required to carry out illegal transactions without violating the protective order (Pet. App. 10a-11a). Finally, the court dismissed petitioner's claim that his name was misappropriated for commercial purposes since proof of any reason why his name was used in connection with the ATC account would also violate the protective order (Pet. App. 12a).

3. The court of appeals reviewed the *in camera* submissions, and, in an unpublished per curiam opinion, affirmed "for reasons adequately stated in the magistrate's report and in the opinion of the district court" (Pet. App. 4a).

ARGUMENT

1. The doctrine of state secrets, which has roots in both the common law and the Constitution, bars litigants from discovering or utilizing at trial information the disclosure of which would be contrary to national security. See, *e.g.*, *Totten* v. *United States*, 92 U.S. 105 (1875); *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). The state secrets privilege recognizes the fact that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). The privilege may be invoked by the head of a governmental department with responsibility over the matter in question, and the department head must have personally considered the matter. See *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953).

Petitioner does not dispute the fact that the government has satisfied these formal requisites for the assertion of the state secrets privilege. Nor does he challenge that portion of the district court's protective order that barred him from "seeking or obtaining any discovery that relates to his allegations of covert relationships between the CIA and either defendant [FNB] or defendant [ATC]." Pet. App. 14a; see Pet. 12. Petitioner's sole objection before this Court is to that portion of the protective order barring him "from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC." Pet. App. 14a-15a; see Pet. 13. Petitioner bases this objection upon the theory that the state secrets privilege cannot be used to "bar a private litigant from using information that he obtained outside the discovery process and without a consensual secrecy agreement with the government." Pet. 14.

2. It is true that in both the *Snepp* and *Totten* cases the state secrets privilege was applied when former (or alleged former) government agents sought to reveal information that they had pledged (expressly in *Snepp* and implicitly in *Totten*) to keep confidential. It does not follow, however, that the privilege may be applied only in such cases. Indeed, the facts of this case demonstrate the limited ability of security clearances and nondisclosure agreements to protect sensitive information. As Director Webster acknowledged, the CIA utilizes proprietary businesses which either appear to conduct or actually do conduct business as private commercial enterprises (C.A. App. 135-136, ¶¶ 7-8). Such a proprietary entity cannot

reveal its CIA connection by requiring secrecy agreements from all private sector individuals with whom it conducts business. Nor can the proprietary subject every private individual with whom it must share information to a full background investigation and security clearance.

3. There is no merit to petitioner's contention that his First Amendment rights have been violated (Pet. 17-22). The government has never sought to prevent petitioner from speaking to the media or otherwise publicizing his speculations. In fact, he has done so.[4] Petitioner has been barred only from testifying in court about those speculations or producing evidence in support of them.

The First Amendment cases upon which petitioner relies are inapposite. In *Butterworth* v. *Smith*, 494 U.S. 624 (1990), the Court considered a Florida statute prohibiting grand jury witnesses from disclosing their testimony and held that the statute violated the First Amendment as applied to a reporter who wanted to publish a story about the subject matter of his testimony. Unlike the reporter in *Butterworth*, however, petitioner has not been barred from speaking about or publicizing his allegations. In

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[4] Petitioner argues that, in the case of privileges such as that between attorney and client, the disclosure of privileged information to third parties who are under no obligation to maintain the confidentiality of that information waives the privilege (Pet. 17). Whether or not that is true about other privileges, it is clear that the state secrets privilege is not "waived" when someone like petitioner makes public unsubstantiated allegations about the CIA. Cf. *Guong* v. *United States*, 860 F.2d 1063, 1065-1066 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989).

addition, the government interest at stake here is national security, not grand jury secrecy.[5]

4. It was proper for the district court, once it had concluded that the state secrets privilege was applicable in this case, not only to prohibit discovery, but also to prohibit petitioner from introducing at trial any evidence tending to confirm or deny a relationship between respondents and the CIA. "Once properly invoked, the effect of the privilege is to exclude the evidence from the case." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). Accord *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992), cert. denied, 113 S. Ct. 1843 (1993); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984).

Indeed, it is settled that the outright dismissal of a case may at times be appropriate if the plaintiff cannot prevail without disclosing privileged information. As this Court held in *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 146-147 (1981) (quoting *Totten*, 92 U.S. at 107) (emphasis added):

> [W]e have held that "public policy forbids the *maintenance* of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as

[5] Petitioner also relies upon *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), in which this Court held that a trial court's issuance of a protective order barring a newspaper from publishing information which the newspaper had obtained through discovery did not violate the First Amendment. This decision reflects the principle that a party's right to publish information acquired through discovery is not unlimited; it cannot be read to mean that there is an unlimited right to use at trial information acquired outside of discovery.

> confidential, and respecting which it will not allow the confidence to be violated."

As the Magistrate Judge recognized, the Fourth Circuit's precedents "support the issuance of a protective order such as that proposed by the government, in that those opinions authorize the even more drastic result of dismissing the plaintiff's case" (Pet. App. 28a) (citing *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc)).

Petitioner argues that he can prevail on his claims "based solely on his own recollection of the threats that were made against him, and of documents shown to him that explain the motivation for these threats." Pet. 3. To allow petitioner to make these allegations at trial, however, would run the risk that state secrets would be disclosed. As the Magistrate Judge noted, "once plaintiff alleges that FNB officials told him that the CIA was involved in ATC, the bank officials and ATC would have to respond in order to defend themselves. Their response would go to the heart of the state secrets that must be protected." Pet. App. 30a-31a. Since it would be unfair to allow petitioner to offer his own speculations at trial, while forbidding counsel for the Bank and ATC to cross-examine him or present rebuttal evidence on these issues, extension of the protective order to petitioner's evidence at trial was an appropriate exercise of discretion by the district court in the circumstances of this case.[6] Cf. *Zuckerbraun*, 935 F.2d at

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[6] The courts below carefully reviewed the classified explanation for the assertion of the privilege. The Magistrate Judge

547 (dismissal is proper where "the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion"); accord *Bareford*, 973 F.2d at 1141; *Molerio* v. *FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984).

The application by the district court of the state secrets privilege to preclude petitioner from presenting evidence at trial that would connect the CIA with the defendants was thus reasonable in light of the specific facts before the court.[7] The affirmance of this protective order by the court of appeals does not conflict with any decision of this Court or any other court.[8] Further review of this issue is therefore not warranted in this case.

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conducted "an extensive investigation into the United States' assertion of the state secrets privilege" (Pet. App. 21a n.4) and even requested that the government file supplemental *in camera* responses addressing additional issues (Pet. App. 21a, 31a). The district court reviewed the Magistrate Judge's recommendation *de novo* (Pet. App. 14a). Finally, the court of appeals reviewed the *in camera* submissions in affirming the district court's ruling (Pet. App. 3a-4a).

[7] Petitioner suggests in his petition and argued in the courts below that the privilege was asserted in this case to cover up illegal activities (*e.g.*, Pet. 17, 21-22). The Magistrate Judge, however, concluded that "Mr. Maxwell's suggestion that the information involves illegal activities is speculation" (Pet. App. 26a-27a), noting that the government's classified submissions provided no support for such allegations (Pet. App. 27a n.9).

[8] Contrary to petitioner's assertion (Pet. 14-15), there is no conflict between this case and *Halpern* v. *United States*, 258 F.2d 36 (2d Cir. 1958). That case bears no factual resemblance to this one. Indeed, it did not even involve a protective order such as that issued by the district court. Halpern was an inventor who filed suit for compensation under the Invention Secrecy Act when the Patent Office entered a secrecy order

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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barring the issuance of a patent for his invention. The Second Circuit rejected the argument that the state secrets privilege barred litigation of Halpern's claim, reasoning that the Act must be viewed as waiving the privilege. See *id.* at 43. The court went on to say, however, that "any such waiver is dependent upon the availability and adequacy of other methods of protecting the overriding interest of national security during the course of a trial." *Ibid.* In this case, of course, petitioner does not contend—nor could he—that a federal statute has waived the privilege.